Supreme Court, U.S.
FILED

041422 MAR 12 2005

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARIA DEL ROSARIO JIMENEZ SANCHEZ
Petitioner
v.

ALBERTO GONZALES ATTORNEY GENERAL
Respondent

On Petition For A Writ of Certiorari To
United States Court of Appeal, Ninth Circuit

USCA No. 04-73565
Agency No. A72-321-106

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S MOTION FOR REVIEW

LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

{X} For cases from Federal Courts

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is

{X} is unpublished.

JURISDICTION

{X} For cases from Federal Court

{X} A timely petition for rehearing was denied by the United States Court of Appeals on the following date; December 14, 2004, and a copy of the order denying a rehearing appears at Appendix A

The jurisdiction of this court is invoked under 28 U.S. C. Section 1254 (1).

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

Immigration and Nationality Act Section 240 A(1) (b)	4
Immigration and Nationality Act Section 244 (b)(2)	10
United States Code Section 1252 (f)(2)	8
United States Code Section 1254 (a) (1)	9
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STATEMENT OF THE CASE

Petitioner is a fifty-three year old female, who is a native and citizen of Mexico. She entered the United States in 1995 without being admitted or paroled after inspection by an immigration officer. Petitioner was subsequently placed in immigration proceedings and became subject to removal. Petitioner requested relief in the form of Cancellation of Removal for non-permanent residents pursuant to INA Section 240 A (1) (b).

The Petitioner acknowledged in her application that she was returned to Mexico by Border Patrol on July 17, 1997, and that she returned two months later and has been present continuously ever since that time. Petitioner argued that her brief departure did not break her continuous presence in the United States as statutorily required for Cancellation of Removal. Petitioner further argued that although she did not have a qualifying relative pursuant to Section 240A(a)(b)(1)(D), she was not afforded equal protection of the laws of the United States guaranteed by the Fourteenth amendment, as other aliens from countries such as Nicaragua, Cuba, or El Salvador need not have qualifying relatives. The Immigration Judge denied Petitioner's request for Cancellation of Removal on April 10, 2003.

The decision of the Immigration Judge was then timely appealed to the Board of Immigration Appeals. On July 19, 2004, the Board of Immigration Appeals affirmed the decision of the Immigration Judge without opinion.

Petitioner then filed a Petition for Review and Stay of Deportation with the Ninth Circuit Court of Appeal on June 21, 2004.

The Ninth Circuit Court of Appeals denied Petitioner's Motion on December 14, 2004.

The Petitioner now files her Petition for a Writ of Certiorari with the Supreme Court of the United States.

THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of

the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioner seeks due process by asking for a review of her claim for relief from deportation. Denial of review in this instance served no equitable purpose and served to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities of

her argument which indicate that she is not being treated equally under the Due Process provisions of the Fourteen Amendment.

The case of Romero-Morales v. INS, 25 F. 3d 125, 129 (9th Cir. 1994), established that the BIA is required to consider the record as a whole and to review all relevant evidence when deciding a motion to reopen.

Furthermore it is clear that the Petitioner in this matter has had her due process violated, in that the BIA dismissed the Petitioner's appeal. This dismissal shows that the BIA failed to make more than even a cursory review which amounts to colorable due process in this context. Larita-Martinez v. INS, 220 F. 3d 1092, 1095-96 (9th Cir. 2000).

Petitions for Review such as the one made by the Petitioner are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F. 2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated, "The petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor."

The case of Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992) states that, "These standards represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified."

In the case of Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, (1988), the court held

that an order by a federal court that relates only to the conduct or progress of litigation by the court ordinarily is not considered an injunction, and therefore is not appealable. However the Supreme Court went on to hold that it will continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious and perhaps irreparable consequences

The case of Artukovoc v. Rison, 784 F 2d 1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

It has now been clearly established that 8 U.S.C. Section 1252 (f) (2) applies to the grant of a temporary stay for an alien once a decision of removal has been ordered. Maldonado v. Fasno, 67 F. Supp. 2d 1170, 1175. 1175 (S.D.Cal. 1999). Under Section 1252 (f) (2) it is stated that; " A final order for removal cannot be stayed "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The terms "clear and convincing," have been held as an intermediate standard, not as high as that of proof "beyond a reasonable doubt," but higher than a "preponderance of evidence." United States v. Meza-Soria, 935 F. 2d. 166, 169, (9th Cir. 1991).

With respect to factual challenges, Section 1252 (f) (2) requires that the alien establish that the order or removal was "manifestly contrary to law." In Dickinson v. Zurko, 527 U.S. 150, 155 (1999), "manifest" was described as something that is apparent, obvious, clear, or undisputable.

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's request for review because there is a high probability that she can prevail on the merits of her claim.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeal Erred In Upholding The Immigration Judge's Decision That Petitioner Was Not Statutorily Eligible For Suspension of Deportation.

The United States Code Section 1254 (a) (1) provides in part that the Attorney General may cancel the deportation of an alien where such alien: "Is deportable under any law of the United States…; has been physically present in the United States for a continuous period of ten years immediately preceding the date of such application.

The Act also states that the person applying for relief must be of good moral character, both statutorily, and in the exercise of discretion. The Petitioner was denied Cancellation of Removal because of a two month's departure from the United States, and because she did not have a qualifying relative for whom extreme hardship would exist if she was deported.

In the case at hand the Petitioner has been present in the United States since 1995, with the exception a two month departure. This departure consisted of a minimal amount of time after which she returned and did not depart again.

It is the Petitioner's contention that she was denied equal protection of the laws of the United States, as guaranteed by the Fourteenth amendment and the Fifth Amendment to the United States Constitution, as other aliens from places such as Nicaragua, Cuba, El Salvador, or Guatemala are not required to have qualifying relatives.

It is clear that individuals from different countries are treated differently. This separation by classification of country is neither reasonable, nor is it acceptable under the law. Any law which gives the United States the right to treat Mexican Nationals differently than others must demonstrate a compelling state interest that establishes the necessity of such treatment. The immigration regulations cannot show a "compelling state interest," and therefore Petitioner's treatment is unconstitutional.

The Immigration Judge abused her discretion initially by denying the Petitioner the right to remain in the United States and to challenge the unconstitutionality of the treatment of Mexican Nationals as opposed to nationals from other countries.

The Petitioner is entitled to Cancellation of Removal and this relief from deportation may be considered a property right. It is clear that no property right can be removed without just compensation. Herein the Petitioner is not consenting to this removal nor is she being compensated for the removal. Therefore her removal is unjust and an abuse of discretion.

The Courts have reasoned that "Failure to consider any of the facts presented constitutes an abuse of discretion" "In making its determination, the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is

returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and immigration history. "In making this determination, relevant factors though not determinative in themselves, must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

In the matter at hand, Petitioner demonstrates continuous presence in the United States. Additionally she has established and maintained her own business since the time of her arrival.

In this instance the 9th Circuit Court erred by supporting the Immigration Judge's decision that removal of the Petitioner was sanctioned due to her innocent two-month departure and due to the fact that she did not have a qualifying relative, although a qualifying relative was not demanded of aliens from other countries.

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any alien can fail to meet the requisite standard for qualification. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no justification for rejection of evidence, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS, 1999 WL 728521 (9th Cir. 1999) that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When the Board initially made a decision to affirm the decision of the Immigration Judge without opinion, it suggests that the Board failed to consider and evaluate the evidence in its entirety. This amounts to a failure of due process, raising an issue of a colorable constitutional claim.

2. The Court of Appeal Erred In Failing To Address The Fact That Petitioner's Case Was Not Reviewed By A Three Member Panel

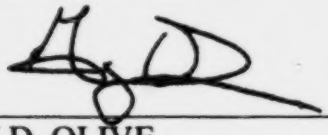
Under recent immigration reform regulations, 67 Fed. Reg. 54, 878, 54, 905 (August 26, 2002), the Petitioner was entitled to have her case reviewed by a Three Member Panel because there is a need to establish precedent construing the meaning of the regulations, and the need to resolve a case or controversy of major national importance. This review was denied to her and the controversy over the meaning of the regulation applied in denying her case has yet to be resolved.

CONCLUSION

Petitioner, through her counsel, contends that the Ninth Circuit Court of Appeals erred in denying her Petition for Review and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit her case to be reopened and remanded so that she can present her application for relief from removal before the Immigration Court.

Dated: March 8, 2005

Respectfully Submitted,



GARY D. OLIVE,
Attorney at Law

Dec 14 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA DEL ROSARIO JIMENEZ SANCHEZ Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 04--73565 INS No. A72-321-106 **JUDGMENT**

Upon Petition for Review of a Decision of the Board of Immigration Appeals

This cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the petition for review of the said decision of the Board of Immigration Appeals in this cause be, and hereby is **DENIED.**

Filed and entered Tuesday December 14, 2004.

APPENDIX A

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: JUN 29 2004

File: A72-321-106 Los Angeles

In re: JIMENEZ SANCHEZ, MARIA DEL ROSARIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Corrales, M. Rito

ON BEHALF OF DHS: Megan Berry, Chief Counsel

ORDER;

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusion upon review of the record coincide with those of the Immigration Judge's April 10, 2003, decision pretermitting her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act. The appeal is dismissed. It is undisputed that the respondent is statutorily ineligible for cancellation of removal under section 240A(b) of the Act because she lacks the qualifying family member and the requisite 10 tear period of continuous physical presence (Tr. at 6 and 9). Inasmuch as the respondent raises an effective assistance of counsel claim, she has failed to comply with any of the procedural requirements we set forth in Matter of Lozada, 19 I&N Dec. 637 (BIA 1998).

APPENDIX B

Nor has she established that her case was prejudiced by her prior counsel's conduct. See Matter of Assad, 23 I&N Dec. 553 (BIA 2003). Accordingly, the appeal is dismissed.

FURTHER ORDER: pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statue, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. Section 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

"s/ "

FOR THE BOARD

APPENDIX B

INA
§ 240
(e) Definitions
In this section and section 240 A:

(1) **Exceptional Circumstances**
The term "exceptional circumstances" refers to exceptional circumstances (such as illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

INA Section 244 (b) (2)

"A brief, casual, and innocent departure from the U.S. that is not meaningfully disruptive does not break seven years continuous presence requirement."

APPENDIX D

8 § 1252

(g) Exclusive Jurisdiction

Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising form the decision or action by the attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. Section 1254 (a) (1)

(a) Granting of status

(1) In general- In the case of an alien who is a national of a foreign state
Designated under subsection (B) (or in the case of an alien having no nationality, is a person who last habitually resided in such a designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) May grant the alien temporary protected status in the United States and shall not remove the alien form the United States during the period which such status is in effect.

(b) Designations

(1) The Attorney General, after consultation with appropriate agencies of the Government may designate any foreign state (or any part of such foreign state) under this subsection only if-

(A) The Attorney General feels there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to that part of that state) would pose a serious threat to their personal safety.

APPENDIX F

U.S. Constitution: Fourteenth Amendment

Amendment Text
Annotations

Section. 1. all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

I67 Fed. Reg. 54, 878, 54 905 (August 26, 2002)

Single-Member Review and New Criteria for three-Member Panel Review

Single member review is mandated for all casses except those falling within one of the five enumerated categories: Those five categories include cases in which there is a need to (1)settle inconsistencies in the rulings of IJ's. (2) clarify ambigueous laws, regulations or procedures; (3) correct an IJ's decision that does not comport with the law; (4) resolve a case or controversy of "major national importance," or (5) correct a clearly erroneous factual determination by an IJ. Cases falling within one of these categories will be adjudicated by a three-Member panel.

APPENDIX H

AMER
RECORDS
AND
BRIEFS

(2)

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041422 MAR 12 2005

No. _____

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v.

ALBERTO GONZALES ATTORNEY GENERAL
Respondent

SUPPLEMENTAL APPENDIX
USCA NO.: 04-73565
Agency No.: A72-321-106

PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File A 72 321 106 April 10, 2003

In the Matter of

MARIA DEL ROSARIO JIMENEZ SANCHEZ,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 212 (a) (6) (A) (i)

APPLICATION: Cancellation of removal pursuant to Section 240A (b) (1), voluntary departure in lieu of removal pursuant to Section 240B (b) (2).

IN BEHALF OF RESPONDENT:

Loretta Ramirez, Esquire

IN BEHALF OF GOVERNMENT:

Megan Berry
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult, female alien, native and citizen of Mexico who entered the United States on

July 18, 1998 without being admitted or paroled after inspection by an immigration officer. In pleading to the Notice to Appear (Exhibit 1), respondent admitted the four factual allegations while conceding, and I am satisfied that she is removable on the charges set forth therein. Respondent designated Mexico as the country of removal and applied for cancellation of removal under Section 240A (b) (1) of the Act.

The Court finds the respondent statutorily ineligible for the requested relief of cancellation of removal on tow grounds: (1) she lacks any qualifying relatives, and (2) she is unable to satisfy the physical presence requirement due to the fact that she signed for voluntary return to Mexico in July 1997, and indeed was returned to Mexico based upon that agreement on July 17, 1997. Accordingly, the Court finds the respondent is statutorily ineligible for the requested relief of cancellation of removal.

And respondent has applied for voluntary departure in the alternative. She is eligible for relief, and I will grant that minimal relief in the exercise of my discretion. There are adverse factors in the respondent's case, to wit, the respondent does have a conviction for shoplifting in this country, and also she was previously granted voluntary return to Mexico, went to that country, and then a short time later returned to this country illegally. Notwithstanding the adverse factors, the Court is prepared to grant the respondent's application for voluntary departure in the exercise of its discretion. The Service indicates that it does not oppose the granting of he application.

Accordingly, the following orders will be entered.

A 72 321 106 April 10, 2003

APPENDIX I

IT IS ORDERED that respondent's application for cancellation of removal pursuant to Section 240A(b) (1) of the Act be and the same is hereby denied.

IT IS FURTHER ORDERED that respondent's application for voluntary departure in lieu of removal pursuant to Section 240B (b) (2) of the Act be and the same is hereby being granted provided respondent departs the United States on or before the 1st of June 2003 or any extension beyond such date granted to her by the District Director or the Immigration Service and provided respondent post a $1,000 departure bond with the Government within five business days of the Court's decision today.

If either of those provisions or conditions is not met, then an alternative order will immediately become effective, to wit, respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear in her case.

William J. Martin
Immigration Judge

A 72 321 106 April 10, 2003

APPENDIX I